Hong Leong Bank Bhd v HGM Machinery Sdn Bhd (formerly known as Handee Engineering & Consultancy Services Sdn Bhd) & Ors

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–51 OF 2004
ZAKARIA SAM J
22 DECEMBER 2012

Banking — Banker and customer — Overdraft facility — Guarantor — Failure to settle excess in overdraft facility — Claims against guarantors — Recovery for amount outstanding and due

Banking — Banks and banking business — Banking facilities — Overdraft facilities — Failure to settle excess in overdraft facility — Claims against guarantors — Recovery for amount outstanding and due — Whether certificate of indebtedness challenged

EON Bank Bhd ('Eon Bank') had acquired the entire banking business of Oriental Bank Bhd through an acquisition agreement pursuant to an order of the High Court. Via a vesting order, the plaintiff took over all the assets, business and liabilities of EON Bank and all pending legal proceedings and in/to which EON Bank was a party. The first defendant was the plaintiff's customer while the second, third, fourth, fifth and sixth defendants were the directors and shareholders of the first defendant. The second to sixth defendants were also guarantors of the facilities given by the plaintiff to the first defendant. The defendants had agreed to pay to the plaintiff all sums due and owing to the plaintiff. Although the plaintiff had made the said facilities available to the first defendant, the first defendant failed to settle the excess in the overdraft facility and the monthly interest due. The plaintiff then uplifted the fixed deposits in the total sum of RM2,490,000 to fully settle the amounts outstanding. As there remained a sum of RM1,915,079.79 due and owing to the plaintiff after uplifting the said fixed deposits, the first defendant agreed to a repayment scheme to enable the first defendant to settle the said sum of RM1,915,079.79. The first defendant failed to settle the balance amount due and owing and subsequently, the plaintiff withdrew the said facility and demanded from the first defendant a total sum of RM2,300,984.74 (comprising the principal sum of RM1,754,544.47 and interest of RM546,440.27). The plaintiff had given the defendants a final notice to settle the total sum of RM2,417,57.79 (comprising the principal sum of RM1,754,544.47 and interest of RM663,033.32). The first to fifth defendants had not made any payments to the plaintiff to settle the outstanding amounts.

A Hence, the plaintiff claimed against the first to fifth defendants jointly and severally for the said sum of RM3,793,835.09, being the amount outstanding under the said facility together with interest, together with interest at the rate of 8% pa.

B **Held,** allowing the claim:

(1) The second, third, fourth and fifth defendants had not raised any valid grounds to challenge the plaintiff's claim. As they did not challenge the certificate of indebtedness, judgment was entered against them for the sum of RM3,793,835.09 as set out in the said certificate of indebtedness C together with interest at the rate of 8%pa on the said sum of RM3,793,835.09 from the date of judgment to the date of full realisation (see paras 21, 60, 98, 122 & 168).

(2) The court did not agree with the contention of the second defendant that D the plaintiff had failed to explain how the fixed deposits had been utilised or applied. The plaintiff had tendered in full and frank disclosure the 'listing of payments made' showing how the proceeds from the upliftment of the fixed deposits pledged with the plaintiff in respect of the said facility had been applied or utilised in order to partly settle the E debt due and owing to the plaintiff (see para 58).

(3) The plaintiff had acknowledged the fixed deposits pledged with the plaintiff inclusive of interest as at December 1998 is a sum of RM2,490,000. Accordingly, the fourth defendant was estopped from F contending that the total fixed deposits pledged was RM2,650,000 or RM3,288,052.71, more so, when such sums had not been pleaded in the fourth defence (see para 105).

(4) It was not correct for the fourth defendant to contend that the plaintiff had withdrawn the claim against the sixth defendant hours before the G trial commenced. The plaintiff had resolved the matter amicably with the sixth defendant prior to the commencement of trial, resulting in the withdrawal of the plaintiff's claim against the sixth, and the withdrawal of the sixth defendant's counterclaim for, inter alia, damages against the plaintiff (see para 118).

H

(5) The plaintiff were justified and entitled to issue or send the said notices of demand to the address as stated in the guarantee notwithstanding the said letter of 5 January 1999 stating the purported 'new address' of the fifth defendant given that under cl 21 of the said guarantee, the plaintiff were I entitled to issue the said notices of demand either to the last known address of the fifth defendant or the address as stated in the said guarantee (see para 150).

(6) If the court should accept the contention by the fifth defendant that 'a proper demand must be made and it is a condition precedent to

establishing a claim against a guarantor', this would tantamount to defeating or overriding the purpose and intention of not only cl 17 of the said guarantee, which makes the fifth defendant a principal debtor, but cl 18 of the said guarantee as well, which provided that all monies which may not be recoverable from the guarantors on the 'footing of a guarantee', shall nevertheless be recoverable from the guarantors on demand as though they were the principal debtors (see para 165).

[Bahasa Malaysia summary

EON Bank Bhd ('Eon Bank') telah memperolehi keseluruhan perniagaan perbankan Oriental Bank Bhd melalui perjanjian pengambilalihan menurut satu perintah Mahkamah Tinggi. Melalui perintah letakhak, plaintif mengambilalih kesemua aset, perniagaan dan liabiliti-liabiliti EON Bank dan semua prosiding-prosiding perundangan dan dalam/yang mana EON Bank merupakan satu pihak. Defendan pertama merupakan pelanggan plaintif manakala defendan kedua, ketiga, keempat, kelima dan keenam merupakan pengarah-pengarah dan pemegang-pemegang saham defendan pertama. Defendan kedua hingga keenam juga merupakan penjamin-penjamin kemudahan yang diberikan oleh plaintif kepada defendan pertama. Defendan-defendan telah bersetuju untuk membayar plaintif kesemua jumlah yang perlu dibayar dan terhutang kepada plaintif. Walaupun plaintif telah menjadikan kemudahan tersebut tersedia kepada defendan pertama, defendan pertama gagal untuk melangsaikan lebihan dalam kemudahan overdraf dan faedah bulanan yang perlu dibayar. Plaintif kemudiannya menarik balik deposit-deposit tetap berjumlah RM2,490,000 untuk menyelesaikan jumlah-jumlah yang belum dibayar. Memandangkan terdapat baki berjumlah RM1,915,079.79 belum dibayar dan terhutang kepada plaintif selepas penarikan balik deposit-deposit tetap, defendan pertama bersetuju dengan skim pembayaran semula untuk membolehkan defendan pertama menyelesaikan sejumlah RM1,915,079.79 tersebut. Defendan pertama gagal untuk menyelesaikan baki jumlah yang perlu dibayar dan terhutang dan sehubungan dengan itu, plaintif menarik balik kemudahan tersebut dan menuntut sejumlah RM2,300,984.74 (termasuk jumlah pokok RM1,754,544.47 dan faedah RM546,440.27). Plaintif telah memberikan defendan-defendan notis akhir untuk menyelesaikan jumlah keseluruhan RM2,417,57.79 (termasuk jumlah pokok RM1,754,544.47 dan faedah RM663,033.32). Defendan pertama hingga kelima tidak membuat apa-apa bayaran kepada plaintif untuk menyelesaikan jumlah yang perlu dibayar. Oleh itu, plaintif menuntut terhadap defendan pertama hingga kelima secara bersama dan berasingan untuk jumlah RM3,793,835.09, yang merupakan jumlah perlu dibayar di bawah kemudahan tersebut beserta faedah, dengan faedah pada kadar 8% setahun.

Diputuskan, membenarkan tuntutan:

(1) Defendan kedua, ketiga, keempat dan kelima tidak mengemukakan

alasan-alasan sah untuk mencabar tuntutan plaintif. Memandangkan mereka tidak mencabar sijil keberhutangan, penghakiman dimasukkan terhadap mereka untuk jumlah RM3,793,835.09 seperti yang dinyatakan dalam sijil keberhutangan bersama dengan faedah pada kadar 8% setahun ke atas jumlah RM3,793,835.09 daripada tarikh penghakiman sehingga tarikh penyelesaian penuh (lihat perenggan 21, 60, 98, 122 & 168).

(2) Mahkamah tidak bersetuju dengan hujahan defendan kedua bahawa plaintif gagal untuk menjelaskan bagaimana deposit-deposit tetap telah digunakan atau digunapakai. Plaintif telah menender pendedahan penuh dan jujur 'senarai bayaran dibuat' menunjukkan bagaimana hasil daripada penarikan balik deposit-deposit tetap yang disandarkan dengan plaintif berhubung kemudahan tersebut digunakan atau digunapakai bagi menyelesaikan sebahagian hutang yang perlu dibayar dan terhutang kepada plaintif (lihat perenggan 58).

(3) Plaintif telah mengakui deposit-deposit tetap disandarkan dengan plaintif termasuk faedah pada Disember 1998 ialah berjumlah RM2,490,000. Dengan ini, defendan keempat diestop daripada menghujah bahawa jumlah keseluruhan deposit tetap ialah RM2,650,000 atau RM3,288,052.71, lebih-lebih lagi, apabila jumlah tersebut tidak diplid dalam pembelaan defendan keempat (lihat perenggan 105).

(4) Adalah tidak benar untuk defendan keempat menghujah bahawa plaintif telah menarik balik tuntutan terhadap defendan keenam beberapa jam sebelum perbicaraan bermula. Plaintif telah menyelesaikan perkara tersebut secara baik dengan defendan keenam sebelum perbicaraan bermula, menyebabkan penarikan balik tuntutan plaintif terhadap defendan keenam dan penarikan balik tuntutan balas defendan keenam untuk, antara lainnya, ganti rugi terhadap plaintif (lihat perenggan 118).

(5) Plaintif dibenarkan dan berhak untuk mengeluarkan atau menghantar notis-notis tuntutan kepada alamat seperti yang dinyatakan dalam jaminan walaupun surat 5 Januari 1999 menyatakan 'alamat baru' defendan kelima yang dikatakan diberikan di bawah klausa 21 jaminan tersebut, plaintif berhak untuk mengeluarkan notis-notis tuntutan sama ada kepada alamat terakhir defendan kelima yang diketahui atau alamat seperti yang dinyatakan dalam jaminan (lihat perenggan 150).

(6) Sekiranya mahkamah perlu menerima hujahan defendan kelima bahawa 'tuntutan yang bersesuaian perlu dibuat dan adalah merupakan satu syarat terdahulu untuk membuktikan tuntutan terhadap seorang penjamin', ini sama seperti menggagalkan atau mengatasi tujuan dan niat bukan sahaja klausa 17 jaminan tersebut, yang menjadikan defendan kelima seorang penghutang utama, tetapi juga klausa 18 jaminan

tersebut yang memperuntukkan bahawa kesemua wang yang tidak boleh diperolehi semula daripada penjamin-penjamin berdasarkan 'imbangan jaminan', namun begitu boleh diperolehi daripada penjamin-penjamin atas tuntutan seolah-olah mereka penghutang-penghutang utama (lihat perenggan 165).]

Notes

For a case on banking facilities, see 1(1) *Mallal's Digest* (4th Ed, 2012 Reissue) para 2365.

For a case on overdraft facilities, see 1(1) *Mallal's Digest* (4th Ed, Reissue) paras 2341–2344.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)

Alfred Templeton & Ors v Mount Pleasure Corp Sdn Bhd [1989] 1 CLJ Rep 219, HC (refd)

Amanah Merchant Bank Bhd v Lim Tow Choon [1994] 1 MLJ 413; [1994] 2 CLJ 1, SC (refd)

Arab-Malaysian Finance Bhd v Chong Chin Shoong [1997] MLJU 264; [1998] 1 CLJ 887, HC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685, FC (refd)

Chung Khiaw Bank Ltd v Soi Huan & Ors [1986] 1 MLJ 188 (refd)

Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282, FC (refd)

Credit Corporation (M) Berhad v Choi Sang & Anor [1989] 1 CLJ (Rep) 440, HC (folld)

Danaharta Urus Sdn Bhd v Chou Kok Hong & Anor [2006] MLJU 350; [2006] 7 CLJ 330, HC (refd)

MBf Finance Bhd v Hasmat Properties Sdn Bhd & Ors [1990] 1 MLJ 180, HC (not folld)

Mok Hin Wah & Ors v United Malayan Banking Corp Bhd [1987] 2 MLJ 610, SC (distd)

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad [1989] 3 MLJ 155, SC (not folld)

Public Bank v Chan Siok Lee & Ors [1989] 2 MLJ 305, HC (folld)

RHB Bank Bhd v Farlim Holding Sdn Bhd & Ors [2005] 2 MLJ 638, HC (distd)

RHB Bank Berhad v WIP Industrial Solutions (M) Sdn Bhd & Ors Suit No D-22NC-2233 of 2010, HC (refd)

United Asian Bank Bhd v Ceras Credit Sdn Bhd & Ors [1996] 4 MLJ 639, HC (refd)

United Merchant Finance Bhd v Hockwood Holdings Sdn Bhd & Ors [1999] 5 MLJ 85, HC (folld)

Legislation referred to

Companies Act 1965 Form 49
Contracts Act 1950 s 91

JJ Chan (Shearn Delamore) for the plaintiff.
KT Rajah Naidu (KT Rajah Naidu & Partners) for the second defendant.
A Param (Param & Co) for the third defendant.
CK Ung (Phee & Co) for the fourth defendant.
Ashok Kandiah (Kandiah Partnership) for the fifth defendant.

Zakaria Sam J:

THE PLAINTIFF'S CASE

[1] By an acquisition agreement dated 30 June 2000 the EON Bank Bhd had acquired the entire banking business of Oriental Bank Bhd pursuant to the order of court dated 5 December 2000 given under Kuala Lumpur High Court ex parte Originating Summons No D9–24–303 of 2000.

[2] By a vesting order dated 17 June 2011 under Kuala Lumpur High Court Originating Summons No 24NCVC-175 of 2011, Hong Leong Bank Bhd took over all the assets, business and liabilities of EON Bank Bhd with effect from 1 July 2011, and that 'all legal proceedings which are pending and in or to which EON Bank is a party' shall be continued from 1 July 2001 as if Hong Leong Bank had been a party thereto instead of EON Bank Bhd.

[3] By an order of the High Court dated 30 January 2012, EON Bank Bhd had been duly substituted by Hong Leong Bank as the plaintiff abovenamed ('the plaintiff').

[4] The first defendant ('D1') at the material time was the plaintiff's customer and the second, third, fourth, fifth and sixth defendants ('D2, D3, D4, D5 and D6') were at the material time directors and shareholders of D1, and were also guarantors of the facilities given by the plaintiff to D1.

[5] D1 had the following facilities with the plaintiff as confirmed in the plaintiff's letter of offer dated 16 November 1995, the supplementary letter of offer dated 25 January 1996, the letter of offer dated 8 May 1996 and the supplementary letter of offer dated 12 August 1996, namely:

(a) the overdraft facility for the amount of RM200,000;

(b) the letters of credit ('LC')/trust receipts ('TR') and bankers acceptance ('BA') facility ('the said LC/TR/BA facility') for the amount of RM3,800,000;

(c) the ad hoc LC/TR/BA facility ('the said ad hoc LC/TR/BA facility') for the amount of RM2,000,000; and

(d) the temporary overdraft facility for the amount of RM800,000.

[6] Fixed deposits in the total sum of RM2,150,000 had been pledged with the plaintiff, as confirmed in the letters of set-off dated 19 September 1995, 23 April 1998 and 27 December 1995, and 6 January 1996 respectively ('the said letters of set-off').

[7] D2, D3, D4, D5 and D6 had executed, inter alia, a guarantee dated 4 January 1996 ('the said guarantee') in favour of the plaintiff, wherein they had agreed to pay to the plaintiff all sums due and owing to the plaintiff from D1 together with interest thereon and costs, charges and expenses up to the principal sum of RM4,000,000. On 11 June 1997, D6 had been discharged as guarantor under the said guarantee.

[8] Although the plaintiff had made available to D1 the said facilities and D1 had duly utilised the same, D1 had since September 1998 failed to settle the excess in respect of the said overdraft facility and the monthly interest due under the said LC/TR/BA facility.

[9] The plaintiff had in or around March 1999 uplifted the fixed deposits in the total sum of RM2,490,000 (inclusive of interest as at December 1998) to fully settle the amounts outstanding under the said overdraft facility and the said TOD facility and to partly settle the amounts outstanding under the said LC/TR/BA facility.

[10] As there remained a sum of RM1,915,079.79 due and owing to the plaintiff under the said LC/TR/BA facility as at 8 April 1999 after the upliftment of the said fixed deposits, D1 had agreed to a repayment scheme to enable D1 to settle the said sum of RM1,915,079.79, the terms of which are as set out in the plaintiff's letter dated 10 April 2000.

[11] Apart from a total sum of RM180,000 paid by D1 to the plaintiff pursuant to the said repayment scheme, which sum the plaintiff had accepted on a without prejudice basis, D1 had failed to settle the balance amount due and owing under the said LC/TR/BA facility.

[12] As D1 had failed to pay the amounts outstanding under the said LC/TR/BA facility, the plaintiff had, by their solicitors' letter dated 14 June

2002 to D1, withdrawn the said LC/TR/BA facility and demanded from D1 a total sum of RM2,300,984.74 (comprising the principal sum of RM1,754,544.47 and interest of RM546,440.27) due and owing as at 31 May 2002 together with further interest accruing and costs.

[13] The plaintiff had by their solicitors' letter dated 14 June 2002 to D2, D3, D4 and D5 respectively, informed them of the withdrawal of the said LC/TR/BA facility and demanded from them as guarantors under the said guarantee the said sum of RM2,300,984.74 due and owing to the plaintiff under the said LC/TR/BA facility as at 31 May 2002 together with further interest accruing and costs.

[14] The plaintiff had by their solicitors' letter dated 7 March 2003 to D1–D5 respectively, given them final notice to settle the total sum of RM2,417,57.79 (comprising the principal sum of RM1,754,544.47 and interest of RM663,033.32) due and owing to the plaintiff under the said LC/TR/BA facility as at 31 January 2003 together with further interest accruing and costs.

[15] D1 to D5 had not made any payments to the plaintiff to settle the outstanding amounts due and owing to the bank under the said LC/TR/BA facility.

[16] In the circumstances, the plaintiff claim against D1 to D5 jointly and severally the said sum of RM3,793,835.09, being the amount outstanding under the said LC/TR/BA facility together with interest thereon as at 11 January 2011, as shown in the certificate of indebtedness dated 11 January 2011 and the statement of accounts, together with interest at the rate of 8%pa on the said sum of RM3,793,835.09 from the date of judgment to the date of full realisation.

[17] Prior to the trial, the plaintiff had resolved the matter amicably with D6, resulting in the withdrawal of the plaintiff's claim against D6, and the withdrawal of D6's counterclaim against the plaintiff.

INDEBTEDNESS OF D1

[18] According to SP1, the indebtedness of D1, including D2 to D6, to the plaintiff as at 11 January 2011 is RM3,793,835.09 as shown in the certificate of indebtedness dated 11 January 2011 and the statement of accounts tendered at the trial.

[19] D1 and/or their solicitors on record had failed to defend the plaintiff's

claim at the trial of the matter and that in addition, there is no evidence on record to rebut the plaintiff's oral and documentary evidence in support of the plaintiff's claim that D1 do owe the plaintiff a sum of RM3,793,835.09 as at 11 January 2011.

[20] In the circumstances, the oral and documentary evidence adduced by the plaintiff at the trial against D1 stand unchallenged and therefore deemed to have been admitted. Accordingly, the indebtedness of D1 to the plaintiff as at 11 January 2011 is RM3,793,835.09.

[21] Consequently, judgment is entered against D1 for the said sum of RM3,793,835.09 together with interest at the rate of 8%pa on the said sum of RM3,793,835.09 from the date of judgment to the date of full realisation. D1 is ordered to pay the plaintiff costs of RM20,000.

INDEBTEDNESS OF D2–D5

[22] I agree with learned counsel for the plaintiff that it is conclusive in the proceedings herein that D2–D5 as guarantors under the said guarantee, do owe the plaintiff a sum of RM3,793,835.09 as at 11 January 2011 in respect of the said LC/TR/BA facility, as shown in the said certificate of indebtedness dated 11 January 2011.

[23] In this regard, cl 19 of the said guarantee provides as follows (bundle B, p 27):

> A certificate by any of our officers as to the money and liabilities for the time being incurred or due to you by or from the Customer shall be conclusive evidence in any legal proceedings against us our executors administrators or legal representatives.

[24] The said certificate of indebtedness dated 11 January 2011 is conclusive evidence of the liability of D2–D5's to the plaintiff for the sum as claimed therein having regard to the established legal principle that such a clause is binding on a guarantor and enables the plaintiff to tender a certificate of indebtedness duly executed by an officer of the plaintiff in order to prove the quantum and correctness of the debt without the need for proof of the indebtedness of the guarantor: *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282.

[25] A certificate of indebtedness excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claimed. A clause of this nature has been described as a conclusive evidence clause. Such clause has been held to be binding and valid. The conclusive evidence clause, if valid, enables the bank by producing a certificate

to dispense with such proof. It means that for the purpose of fixing the liability of a surety, the customer's indebtedness may be ascertained conclusively by a certificate: *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685.

[26] Although the plaintiff were in law only required to tender the certificate of indebtedness dated 11 January 2011 in order to establish their claim against D2 to D5, the plaintiff had tendered as well in full and frank disclosure the statement of accounts showing a comprehensive and detailed computation of how the plaintiff had arrived at the said sum of RM3,793,835.09, being the amount due and owing under the said LC/TR/BA facility as stated in the certificate of indebtedness dated 11 January 2011.

[27] Apart from the fact that D2 to D5 are bound by cl 19 of the said guarantee in respect of the said certificate of indebtedness dated 11 January 2011, D2 to D5 had not raised any reasonable doubt as to the veracity of the said certificate of indebtedness dated 11 January 2011, including the statement of accounts prepared by the plaintiff.

[28] In fact, learned counsel for D2, D3 and D5 during cross-examination of SP1 had not challenged her evidence on the said certificate of indebtedness dated 11 January 2011 and the statement of accounts, whether in respect of any manifest error or otherwise. In the circumstances, the sums and calculations as stated therein are deemed to have been admitted or wholly accepted by D2–D3 and D5: *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639.

D2'S CASE

[29] D2 had resigned as a director and shareholder of D1 with effect from 3 March 1999.

[30] Learned counsel for D2 contends that D2's resignation from D1 had been intimated to the plaintiff and that D2 had been assured by the plaintiff that he would be released from liability under the said guarantee.

[31] It was contended that D2's liability pursuant to the said guarantee cannot be extended to cover the restructuring or repayment scheme agreed between the plaintiff and D1 in view of his resignation as director of D1.

[32] It was contended that D2 was not privy to the said restructuring or

repayment scheme, and that the plaintiff had breached the terms and conditions of the said letters of offer in approving the said restructuring or repayment scheme.

[33] It was contended that the proposal by D1 to 'convert the balance of the existing overdue to a term of 7 years' would constitute a departure from the said letters of offer rending the said guarantee 'null and void and not enforceable'.

[34] It was contended that D2 had been discharged from liability as guarantor under the said guarantee essentially for the following reasons:

(a) the plaintiff failed to explain or give an account of the fixed deposits pledged by D1 and also by him;

(b) the fixed deposits pledged with the plaintiff had been uplifted without his knowledge and consent; and

(c) D6 was discharged without first obtaining the consent of all the other guarantors under the said guarantee.

FINDINGS

Resignation of D2 as director

[35] I would not entertain the contention by learned counsel for D2 that D2's resignation as shareholder and director had been intimated to the plaintiff and that D2 had been assured by the plaintiff that he would be released from liability under the said guarantee because such matters had not been pleaded in D2's defence nor established in the evidence given by D2 at the trial.

[36] In any event, I agree with the contention by learned counsel for the plaintiff that the plaintiff had not discharged D2 as guarantor under the said guarantee, for the following reasons:

(a) that the plaintiff had by way of their letter dated 10 April 2000 to D1 informed D1 that the plaintiff 'is not agreeable to discharge the guarantor, Goh Hock Hai ('D2') as requested';

(b) that according to SP1, the plaintiff had not discharged D2 as guarantor under the said guarantee and that the usual practice adopted by the plaintiff in discharging a guarantor would be a letter to that effect issued by the plaintiff to the guarantor eg the letter of discharge dated 11 June 1997 issued by the plaintiff to D6 (Mr Tan Kean Teik); and

(c) D2 had failed to produce any letter by the plaintiff to D2 discharging him as guarantor under the said guarantee.

[37] I agree with the contention by learned counsel for the plaintiff that the fact that D2 had resigned as director of D1 on 3 March 1999 does not discharge him as guarantor under the said guarantee, as there is no provision in the said guarantee stating that a guarantor would be discharged upon his resignation as director of D1.

[38] Clause 24 of the said guarantee provides that:

> You may enforce this guarantee against us at any time notwithstanding that any bills or other instruments covered by it may be in circulation or outstanding and you may include the amount of the same or any of them to the whole amount outstanding or not at your option, and this guarantee shall not be determinable by us except on the terms of our making full provision up to the limits of our guarantee for any then outstanding liabilities or obligations owing by the Customer to you.

[39] Under the said cl 24, it is clear that the said guarantee cannot be terminated and remains binding and enforceable against the guarantor until and unless the outstanding sums due and owing by D1 to the plaintiff has been fully settled: *Chung Khiaw Bank Ltd v Soi Huan & Ors* [1986] 1 MLJ 188.

Restructuring or repayment schemes

[40] I do not agree with the contention by learned counsel for D2 that D2's liability pursuant to the said guarantee 'cannot be extended to cover the restructuring or the new repayment schemes' agreed by the plaintiff with the D1 by reason of D2's resignation as director of the D1. This is because D2's resignation does not discharge him as guarantor under the said guarantee, and that the said guarantee remains binding and enforceable against him until the outstanding sums due and owing by D1 to the bank has been fully settled.

[41] I also do not agree with the contention by learned counsel for D2 that the plaintiff had breached the terms and conditions of the said letters of offer in approving the 'restructuring or repayment scheme' with D1. Such arrangements had been proposed by D1 and agreed upon by the plaintiff for the purpose of assisting D1 in paying the outstanding debts due and owing to the plaintiff.

[42] It is important to note that D2 had not taken any issue with the plaintiff's approval of the 'restructuring or repayment scheme', whether in his defence or his evidence given at the trial.

[43] Besides, I agree with learned counsel for the plaintiff that it was within the plaintiff's right to enter into any 'restructuring or repayment scheme' with

D1. It was immaterial whether or not D2 was privy to the proposed 'restructuring or repayment schemes', having regard to cl 11(c) of the said guarantee, which provides that:

> This guarantee shall be without prejudice to and shall not be affected by, nor \//shall we be released or exonerated by and we expressly given our consent to any of the acts or matters following, that is to say:
>
> (a) …
>
> (b) …
>
> (c) any time given or extended to the Customer and/or any other person or persons including anyone or more of us and the parties to any negotiable or other security instrument guarantee or contract and any other indulgence granted to or compromise composition or arrangement made with the Customer and/or any other person or persons including anyone or more of us whether with or without consent from or notice to us;

[44] The said proposed 'restructuring or repayment schemes' were arrangements as between the plaintiff and D1 that do not affect the obligations of D2 as guarantor under the said guarantee.

[45] In any event, the proposed 'restructuring scheme' as contained in the plaintiff's said letter dated 12 February 1999 to D1 had been declared null and void due to 'non-completion of the restructuring documents' by way of the plaintiff's said letter fated 10 April 2000. The proposed 'repayment scheme' as contained in the plaintiff's said letter dated 10 April 2000 was not completed as D1 had failed to comply with the terms thereof.

[46] I do not agree with the contention by learned counsel for D2 that the mere proposal made by D1, by way of their letter dated 26 February 2000 to the plaintiff, to 'convert the balance of the existing overdue to a term of 7 years' would constitute a departure from the said letters of offer rending the said guarantee 'null and void and not enforceable'.

[47] Besides, learned counsel for the plaintiff had rightly pointed out that the said proposal by D1 to the plaintiff had not been agreed upon by the plaintiff, as is apparent from the plaintiff's said letter dated 10 April 2000 in response to D1's said letter dated 26 February 2000.

Discharge of D6

[48] It is to be observed that the issue over D6's discharge as guarantor under the said guarantee was not raised as part of D2's defence nor was it raised in the evidence by D2 at the trial. It was therefore irregular and inappropriate that this

issue had been raised In the written submissions filed by D2's counsel, more so, when the issue had not been raised in the statement of issues to be tried.

[49] Be that as it may, I agree with the contention by learned counsel for the plaintiff that the discharge of D6 as guarantor under the said guarantee would not amount to a breach of the terms and conditions of the said guarantee, thereby discharging D2 as guarantor under the said guarantee, having regard to cl 11(d) of the said guarantee which provides that:

> This guarantee shall be without prejudice to and shall not be affected by, nor shall we be released or exonerated by and we expressly given our consent to any of the acts or matters following, that is to say:
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) Any release or discharge given to any one or more of us whether with or without consent from or notice to us:

[50] Under cl 11(d), the plaintiff were clearly not required to notify D2 of the discharge of any of other the guarantors, nor were they required to obtain the consent of D2 prior to discharging D6 as guarantor under the said guarantee.

[51] Moreover, s 91 of the Contracts Act 1950 provides that:

> Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.

[52] I agree with learned counsel for the plaintiff that the plaintiff were entitled to discharge D6 as guarantor under the said guarantee without notifying or obtaining the prior consent of the other guarantors, including D2.

At any rate, D2 would have known or ought to have known about the said discharge, having regard to the following:

(a) that the letter dated 11 June 1997 discharging D6 as guarantor under the said guarantee had been copied to D2;

(b) that D2 was at the time of the discharge of D6, the chairman and director of D1;

(c) D3 had, during cross-examination by learned counsel for the plaintiff, revealed as follows:

(i) that D2 was instrumental in all the dealings with the plaintiff and that D2 would 'definitely have known about the discharge of D6 as guarantor'; and

(ii) that he had written a letter dated 21 April 1997 on behalf of D1 to the plaintiff under D2's instruction to discharge D6 as guarantor;

(d) the said letter dated 21 April 1997, which had been copied to D2 as chairman of D1 and D4 as a director of D1, states as follows:

> Please be informed that our Finance & Admin Director, Mr Tan Kean Tek, had resigned w.e.f. 21 April 1997. Therefore, we would appreciate if you could kindly arrange to release him as a guarantor for the existing banking facilities that he has signed on behalf of Handee Engineering & Consultancy Services Sdn Bhd with yourselves.

(e) that both D3–D4 (as directors of D1) had during cross-examination by learned counsel for the plaintiff acknowledged that D6 had been discharged by the plaintiff at the request of D1 and that they were aware about the said discharge.

Fixed deposits

[53] It has to be pointed out that learned counsel for D2 had not disputed nor challenged SP1's evidence that the total fixed deposits pledged with the bank in respect of the said LC/TR/BA facility is a total sum of RM2,150,000, as per the said letters of set-off.

[54] The issue that the said fixed deposits had been uplifted without D2's knowledge and consent had not been raised in D2's defence and that no such evidence had been given by D2 at the trial. This issue had been first raised in the written submissions filed by D2's counsel. In the circumstances, learned counsel for D2 is not allowed to raise the issue that the fixed deposits had been uplifted without D2's consent and knowledge, more so, when this issue had not been raised in the statement of issues to be tried.

[55] Be that as it may, I agree with the contention by learned counsel for the plaintiff that the plaintiff were entitled to uplift the fixed deposits in order to partly settle the debt due and owing to the plaintiff without the knowledge and consent of D2 having regard to the following:

(a) that cl 4 of the said letters of set-off provides as follows:

> It /We hereby agree that in addition to any general lien or similar right to which you as bankers may be entitled by law you may at any time and without notice to me/us adjust your dues against the said advance by way of set-off or transfer of the amount of the Fixed Deposit No … or Fixed Deposit Receipts Nos … or any Fixed Deposits from time to time substituted for or replacing the same upon renewal together with interest or accrued thereon in or towards satisfaction of any of my/our liabilities to you on my/our current account with you and/or on any account whatsoever and/or in any other respect whether such liabilities be actual or contingent, primary or collateral.

(b) cl 5 of the said letters of set-off provides as follows:

> I/We irrevocably declare and undertake that lA/Ve will have no claim against you whatsoever on the amounts so adjusted from the Fixed Deposit Receipt No … or Fixed Deposit Receipt Nos … or any Fixed Deposits from time to time substituted for or replacing the same upon renewal;

(c) D3, as managing director of D1 had, during cross-examination, conceded that the plaintiff have the 'right to uplift the said fixed deposits without giving them (the guarantors) notice'.

[56] Apart from the fact that the plaintiff were clearly entitled to uplift the 20 said fixed deposits without the knowledge and consent D2 in order to partly settled the debt due and owing to the plaintiff, I find that D2 would have known or ought to have known about the said upliftment in view of the plaintiff's said letter dated 12 February 1999 to D1 stating, inter alia, as follows:

> Please note that the Bank will uplift the existing Fixed Deposit of RM2,490,000.00 (inclusive interest earned as at December 1998) to fully settle the existing overdraft facility of RM200,000.00 and remaining unsettled temporary overdraft and interest in arrears of RM195,000.00 as at 7th January 1999 ….

[57] This letter had been issued to D1 at the time D2 was the chairman and director of D1. Incidentally, D2 in his witness statement had referred to this letter including its contents as well. D3 had, during cross-examination, revealed that the D2 was instrumental in all the dealings with the plaintiff and that 'most of the bank restructuring' was done by D2.

[58] I do not agree with the contention by learned counsel for D2 that the plaintiff had failed to explain how the fixed deposits had been utilised or applied. As pointed out by learned counsel for the plaintiff, the plaintiff had tendered in full and frank disclosure the 'listing of payments made' showing how the proceeds from the upliftment of the fixed deposits pledged with the plaintiff in respect of the said LC/TR/BA facility had been applied or utilised in order to partly settle the debt due and owing to the plaintiff.

[59] It is important to point out that learned counsel for D2 or for that matter, learned counsel for D3, D4 and D5 had not made any attempt to challenge the said 'listing of payments made'. SP1, who had prepared the said 'listing of payments made' was not asked any questions regarding the sums and calculations set out therein. As such, the sums and calculations pertaining to the fixed deposits as set out in the said 'listing of payments made' are deemed to have been admitted or wholly accepted.

CONCLUSION

[60] In the circumstances, I find that learned counsel for D2 had not raised any valid grounds to challenge the plaintiff's claim. Accordingly, and as learned counsel for D2 has not challenged the certificate of indebtedness dated 11 January 2011, judgment is entered against D3 for the sum of RM3,793,835.09 as set out in the said certificate of indebtedness dated 11 January 2011 together with interest at the rate of 8%pa on the said sum of RM3,793,835.09 from the date of judgment to the date of full realisation.

D3'S CASE

[61] Learned counsel for D3 contends that the banker's acceptance documents ('BA documents') ought to have been tendered at the trial, as the plaintiff's claim is based on the BA documents.

[62] It was contended that the plaintiff's calculation of the fixed deposits was wrong and that, accordingly, the amount claimed by the plaintiff was wrong as well. It was contended that the plaintiff's 'actual claim should be about RM884,297.29'. D3 also contended that there had been a delay in the upliftment of the fixed deposits.

[63] D3 in his evidence alleged that he was not aware whether the temporary overdraft of RM800,000 was utilised by D1, and that according to learned counsel for D3, D3 was not cross-examined on this issue.

[64] It was contended that D3 did not receive the notice of demand dated 14 June 2002 and the notice of demand dated 7 March 2003 issued by the plaintiff. It was further contended that the service of a notice of demand on D3 is a prerequisite in law, and that the effect of the non-service of such a demand would preclude the plaintiff from filing the claim herein.

FINDINGS

BA documents

[65] I find that the BA documents were not required to be produced by the

plaintiff as evidence in support of their claim against D3, as the plaintiff's claim is based on the said letters of offer and the said guarantee.

[66] SP1 during re-examination by learned counsel for the plaintiff explained why the BA documents were not produced in court:

> The Bankers Acceptance Certificates were never raised as an issue. In the letter dated 10.4.2000 at page 75 of Bundle B, the debt was already stated under the reference. The banker's acceptance certificates are stated there. The principal amounts are all stated there. This letter was confirmed, accepted by the company (D1), D3 and D4, and that similarly, there are other letters where the debt was also admitted and acknowledged, for example, the letter dated 12.2.1999, which is at pg 46 of Bundle B, where the amount stated there had also been accepted. Basically the main one is the letter of 10.4.2000, which is at pg 75 of Bundle B. So there was no issue made of the amount owing at that point of time. So we did not think it was necessary to produce (the BAs)

[67] In addition, the BA documents had not been raised as an issue by D3 in his defence, nor did the D3 issue a notice to produce to the plaintiff in respect of the BA documents prior to the trial.

Fixed deposits

[68] It has to be pointed out that though D3 in his defence stated that the fixed deposits pledged with the plaintiff is a sum of RM2,388,052.71, he had in his evidence stated that a sum of RM3,288,052.71 had been pledged with the bank instead.

[69] I do not agree that the fixed deposits pledged with the bank in respect of the said LC/TR/BA facility is RM3,288,052.71, and that I agree with learned counsel for the plaintiff that the fixed deposits pledged with the bank is in fact the total sum of RM2,150,000.

[70] According to SP1, the fixed deposits pledged with the bank in respect of the said LC/TR/BA facility is a total sum of RM2,150,000 as per the said letters of set-off. SP1 had, during cross-examination by learned counsel for D3, explained that the letter of set-off dated 29 September 1998 amounting to RM1,138,052.71, which was referred to in the written submissions filed by the learned counsel for D3, is actually a fresh letter of set-off to reflect the fixed deposits in the total sum of RM900,000 in respect of the letters of set-off dated 27 December 1995 and 6 January 1996 with the addition of interest.

[71] In addition, the fact that the fixed deposits pledged with the bank in

respect of the said LC/TR/BA facility is the sum of RM2,150,000 is confirmed by the following:

(a) paras b–c of the said supplementary letter of offer dated 25 January 1996 (an agreed document) in respect of the said LC/TR/BA facility, which states as follows:

(i) Pledge of RM1,250,000 fixed deposit together with letter of set-off duly executed.

(ii) RM150,000 is to be placed quarterly in a fixed deposit as sinking fund until it reaches RM900,000;

(b) the plaintiff's letter dated 12 February 1999 issued to D1 for the attention of D3 as managing director, the contents of which had been confirmed and accepted by D3, which states as follow:

Existing Facility:

(1) Pledge of RM1.25 million Fixed Deposit (3rd Party) together with letter of Set-Off executed

(2) RM 150,000.00 is to be placed quarterly in a fixed deposit as sinking fund until it reaches RM900,000.00

[72] In addition, the plaintiff's said letter dated 12 February 1999 issued to D1 also states that the 'existing fixed deposit' inclusive of interest as at December 1998 is a sum of RM2,490,000.

[73] Therefore, I agree with counsel for the plaintiff that D3, in accepting and confirming the contents of the said letter dated 12 February 1999, had clearly acknowledged that the fixed deposits pledged with the bank inclusive of interest as at December 1998 is a sum of RM2,490,000. Accordingly, D3 is estopped from contending in his evidence that the fixed deposits pledged with the plaintiff is a sum of RM3,288,052.71, more so, when such sum had not been pleaded in his defence.

[74] It bears reiterating that the plaintiff had prepared and tendered the 'listing of payments made' showing how the proceeds from the upliftment of the fixed deposits in the said sum of RM2,490,000 had been applied in order to settle or partly pay the debt due and owing to the bank and that this document had not been challenged by learned counsel for D4 or for that matter, by learned counsel for D2, D3 and D5. As such, the sums and calculations pertaining to the fixed deposits as set out in the 'listing of payments made' are deemed to have been admitted or wholly accepted.

[75] SP1 during cross-examination by learned counsel for D4, had denied

that there had been a delay in the upliftment of the fixed deposits in the sum of RM2,490,000 and had, during re-examination, explained as follows:

> Around that time, there were negotiations between borrower (D1) and the Bank. This letter dated 12.2.1999, which is at pg 46 of Bundle B, was issued by Bank, accepted by the borrower, and returned to the Bank on 4.3.1999. So basically the fixed deposit was uplifted between March and the 1st week of April, which is about 1 month, so as there are many FDs, it took time to process, and it is not unreasonable delay on the Bank's part. My answer is that there's no delay. But in addition to that, if I may draw attention of the court to pg 21 of Bundle B, this is a letter of set-off by the company in respect of the fixed deposits. When the company pledged the FD, they also signed the letter of set-off that gives the bank the right to offset the fixed deposit against the loan. So this is the letter of set-off. Para 4 of this letter of set-off. There's no time frame. Actually it's at the Bank's discretion. That's why my answer is that there was no delay.

Temporary overdraft

[76] I agree with learned counsel for the plaintiff that D3 was cross-examined on the issue over the temporary overdraft, and that D3 had acknowledged that he was aware that D1 had utilised the temporary overdraft. Besides, the temporary overdraft is not the subject matter of the claim, and that it is reiterated that the plaintiff's claim is for the outstanding sums due and owing under the said LC/TR/BA facility, as confirmed in the prayers of the statement of claim.

Demand

[77] The notices of demand dated 14 June 2002 and 7 March 2003 ('the said notices of demand') had been sent to the D3 at the address as stated therein. This address had been confirmed by D3 during cross-examination by counsel for the plaintiff and Form 49 of the Companies Act 1965 dated 3 March 1999.

[78] SP2 (Bascaran a/l Mayandi) who is the search/service clerk of Messrs Shearn Delamore & Co, the plaintiff's solicitors, testified that:

(a) the said notices of demand had been sent to the defendants, including the D3;

(b) the proof of posting is at pp 1–7 of bundle J; and

(c) the registered post slips at pp 1–7 of bundle J contain a 'chop' by the postal authority acknowledging receipt of the said notices of demand.

[79] Learned counsel for D3 had, during cross-examination of SP2, not

challenged the said evidence given by SP2 that the said notices of demand had been issued or sent to the third defendant at the address as stated therein. Therefore SP3's evidence is deemed to have been admitted.

[80] Consequently, learned counsel for D3 is estopped from challenging the issuance of the said notices of demand to D3 in his written submissions on the basis that there was 'no address on the postal receipts', more so, when the issuance of the said notices of demand on D3 was not an issue raised in the statement of issues to be tried.

[81] In any event, I agree with the contention by learned counsel for the plaintiff that there is no requirement that the address of D3 had to be stated in the postal receipts. On this issue, it is relevant to highlight the following observation made by Haji Hamid Sultan J in *RHB Bank Berhad v WIP Industrial Solutions (M) Sdn Bhd & Ors* Suit No D-22NC-2233 of 2010:

> *In this instant case the plaintiff says that the letter of demand has been properly served on the guarantors by registered post, and produces the receipt given by the post office which has only the name of the guarantors but not the address. I must say here that those who have experience in having posted a registered letter will attest that the post office will not accept any letter to be registered if it is not properly addressed to the recipient of the mail.* In addition the plaintiff in the instant case relies on cl 21 of the guarantee to say that the letter of demand at the guarantors' last known address by registered post of ordinary mail shall be deemed to have been served. In the instant case the defendants have failed to rebut the presumption of service as prescribed in the above deeming clause. (Emphasis added.)

Presumption of service

[82] I agree with the contention by learned counsel for the plaintiff that it is immaterial whether or not the said notices of demand had been received by D3 in view of the terms and conditions of the said guarantee and, more importantly, the established principle of law that the bank are not required to show that the notice of demand had been received by a guarantor so as to constitute a proper demand, but are only required to show that the notice of demand had been issued or sent to the guarantor.

[83] Clause 21 of the said guarantee (bundle B, p 27) provides that:

> Any demand for payment of moneys or any other demand or notice under this guarantee may be made by a Manager, Accountant or an Officer for the time being of yours or by any person or firm for the time being acting as solicitor or solicitors for you by letter addressed to us our executors administrators or legal representatives and *sent by post or delivered to our address last known to you or stated hereunder and a*

notice or demand so given or made shall be deemed to be given or made or received at the time when the letter would In the ordinary course of post be delivered. (Emphasis added.)

[84] I find that D3 has failed to rebut the presumption of service as prescribed in the above deeming clause. In *Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413; [1994] 2 CLJ 1, the Supreme Court held that:

> On the proper construction of cl 17, since any notice may be served by sending the same through the post addressed to the last known address of the addressee; the deeming provision applied to the said notice, whether or not is sent by AR registered post. *It is not necessary that the appellant must show that the AR card has been duly acknowledged to constitute effective service of the notice of demand. It is sufficient for the appellant to show that the notice was correctly addressed, prepaid and delivered to the post office and acknowledged for service by the postal authority. Once these facte have been established, the deeming provision will inevitably apply.* (Emphasis added.)

[85] In *Arab-Malaysian Finance Bhd v Chong Chin Shoong* [1997] MLJU 264; [1998] 1 CLJ 887, the High Court made the following observation:

> Clause 8 is a contractual provision regarding service. It is in the form of a deeming provision. By it, the parties agreed that, if the notice is sent by registered post, it shall be regarded as having been received within forty-eight hours after posting. *That means they agreed that proof of actual receipt I would not be necessary.* It is a contractual device for the convenience of the parties. A party to such a device may not refuse to accept delivery, and then rely on proof of non-delivery to claim there has been no receipt, because that would be to frustrate the device that he has agreed to. He must be taken to have received the notice or whatever it was that was sent to him.
>
> So in this case the fact that the letter came back marked 'tidak dituntut' cannot displace the deeming that it had been served, because to allow it to do so would be to permit the defendant, if he had chosen to do so, to frustrate the device by refusing to accept delivery of the letter. As I said, the inescapable implication is that in fact that was what happened.
>
> I do not have to decide whether, in law, it would be open to the defendant to rebut the presumption of receipt provided by cl 8, because he has not attempted to do so. *A bare denial of having received the letter of demand will not do.* (Emphasis added.)

[86] In the circumstances, it is clear that the bank were not required to tender the AR card duly acknowledged by the D3 as contended by learned counsel for D3. RK Nathan J in *United Asian Bank Bhd v Ceras Credit Sdn Bhd & Ors* [1996] 4 MLJ 639, had this to say:

> Where the demand clause in a guarantee does not specify that a demand notice is to be sent by registered post or by AR registered post, there is no need to show proof of actual receipt by way of an AR card duly acknowledged so long as the plaintiff can show that the notice of demand was property addressed to the guarantors and handed to the post office.

Principal Debtor Clause

[87] In any event, I agree with the contention by learned counsel for the plaintiff that the said notices of demand were not required to be issued or sent to D3, having regard to the 'principal debtor clause' in the said guarantee, which obviates the need for the service of a notice of demand.

[88] Clause 17 of the said guarantee provides:

> Though as between us and the Customer we are sureties only for the Customer, yet as between us and you we and each of us shall be deemed to be principal debtors for all the moneys the payment of which is hereby guaranteed and accordingly *shall not be discharged nor shall our liability be affected by any fact or circumstances or any act thing omission or means whatsoever, whereby our liability would not have been discharged if we had been the principal debtors.* (Emphasis added.)

[89] Further, cl 18(a) of the said guarantee provides:

[90] For the consideration aforesaid and as a separate and independent stipulation:

(a) we hereby agree that all sums of moneys which may not be recoverable from us on the footing of a guarantee whether by reason of any legal limitation disability or incapacity on or of the customer or any other fact or circumstances, whether known to you or not *shall nevertheless be recoverable from us on demand as though we were the sole and principal debtors.* (Emphasis added.)

[91] The cases of *RHB Bank Bhd v Farlim Holding Sdn Bhd & Ors* [2005] 2 MLJ 638 and *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610 cited by learned counsel for D3 are distinguishable from this case and, hence not applicable, primarily because those cases did not consider the issue and effect of a 'principal debtor clause'.

[92] M Shankar J (as he then was) in *Public Bank v Chan Siok Lie & Ors* [1989] 2 MLJ 305 had considered the *Mok Hin Wah*'s case and the effect of a 'principal debtor clause', and made the following observation:

> I agree that great care should be taken when applying *Mok Hin Wah*'s case to remember that it will only apply if the words of the guarantee specifically make a prior demand a condition precedent to suing the guarantor. *There is no general rule that in all cases, regardless of the terms of the document, a prior precise demand is a sine qua non to the commencing of an action. Nor is there any general rule that a prior notice must be given in all cases. The writ itself is a notice:* see *Malayan Banking Bhd v Lim Chee Leng & Anor* [1985] 1 MLJ 214 …

[93] His Lordship continued:

> A far clearer exposition of the law on the point is given in *O' Donovon's Modern Law of Guarantee* at pp 379–382 … At p 380 of the text it says that even though the amounts under the guarantee are expressed to be payable 'on demand' the inclusion of a 'principal debtor' clause in the body of a guarantee may obviate the necessity for the creditor to make a demand. Reference is made to the comments of Walton J in *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 1 WLR 1474. *This I hold, that where the effect of a guarantee agreement is to make guarantors principal debtors, the necessity for a demand could be obviated because the character of the agreement under which payment is sought is no longer strictly collateral.* (Emphasis added.)

[94] Siti Norma Yaakob J (as she then was) in *Credit Corporation (M) Berhad v Choi Sang & Anor* [1989] 1 CLJ (Rep) 440 had also considered the *Mok Hin Wah* case and the Public Bank case and made the foilowing observations:

> *The law on the effect of the presence of a principal debtor clause in a guarantee is clear in that it obviates the necessity of a creditor to make a demand.* This is so as a guarantee is a collateral agreement and before being sued, it is only right and just that a demand be made on the guarantor. However, the character of the guarantee changes where there is also included a principal debtor clause in the body of the guarantee. *The guarantee is no longer a collateral agreement and as such there is no need for a demand as the issuance of the writ is a demand in itself. Mok Hin Wah's case is distinguishable in that the guarantee sought to be enforced did not contain principal debtor clause and as such the case is not applicable to the facts of the case before me.*

Her Ladyship continued:

> On the other hand, *Public Bank*'s case is supportive of the plaintiff's case as in that case, *Dato' Shankar J was also of the view that no demand is necessary where there is a principal debtor clause. However where a guarantee contains both a written demand clause and a principal debtor clause, it is my considered opinion that the latter overrides the condition precedent of a written demand.* (Emphasis added.)

[95] Clement Skinner JC (as he then was) in *United Merchant Finance Bhd v Hockwood Holdings Sdn Bhd & Ors* [1999] 5 MLJ 85 had also considered the *Mok Hin Wah* and *Public Bank* cases and made the following observations:

> Learned counsel for the third defendant, at the resumed hearing, informed me that in view of the authorities above cited and because by cl 2.1 of the guarantee in this case *the guarantors had agreed to be principal debtors and not just sureties, he was unable to contend that the guarantee the court is now considering* is an 'on demand' guarantee …

[96] The plaintiff by the terms of the guarantee abovementioned is clearly entitled to look to D3 as principal debtor for payment of a present debt owing

as opposed to a collateral debt and without having to give to the D3 any prior notice or demand in respect of any default having been made by the D1.

[97] In the above circumstances, and as it is conceded by learned counsel for the D3 that this guarantee is not a 'demand guarantee', I find that the plaintiff sending notices of demand to addresses other than that stated in cl 18.1 of the guarantee would not make any difference in this case as the filing and service of the writ herein on the third defendant constituted a sufficient demand obliging the third defendant to pay. (Emphasis added.)

CONCLUSION

[98] In the circumstances, I find that learned counsel for D3 had not raised any valid grounds to challenge plaintiff's claim. Accordingly, and as learned counsel for D3 had not challenged the certificate of indebtedness dated 11 January 2011, judgment is entered against D3 for the sum of RM3,793,835.09 as set out in the said certificate of indebtedness dated 11 January 2011 together with interest at the rate of 8%pa on the said sum of RM3,793,835.09 from the date of judgment to the date of full realisation.

D4'S CASE

[99] D4 contends that the fixed deposits pledged with the plaintiff is not a sum of RM2,150,000 as contended by the plaintiff, but a sum of RM2,650,000 or RM3,288,052.71, having regard to the said letters of set-off tendered at the trial by the plaintiff.

[100] D4 further contends that the interest applied and claimed by the plaintiff in the certificate of indebtedness dated 11 January 2011 is wrong and not in accordance to the 'terms of the contract'. D4 therefore claims that there is a manifest error in the certificate of indebtedness dated 11 January 2011.

[101] D4 also contends that he had been discharged as guarantor under the said guarantee, given that the plaintiff had not secured a fixed deposit in the sum of RM500,000 from D1, and as the plaintiff had discharged D6 as guarantor under the said guarantee.

Fixed deposits

[102] It is to be observed that though D4 in his defence had stated that the fixed deposits pledged with the bank in respect of the said LC/TR/BA facility is RM2,388,052.71, learned counsel for D4 in his written submissions is now taking the position that the fixed deposits pledged is RM2,650,000 or RM3,288,052.71.

[103] I do not agree that the fixed deposits pledged with the bank in respect of the said LC/TR/BA facility is RM2,388,052.71 or RM2,650,000 or RM3,288,052.71 as contended by learned counsel for D4. As explained earlier, I agree with the contention by learned counsel for the plaintiff that the total fixed deposits pledged with the bank is the total sum of RM2,150,000 (see my findings in relation to D3's case above).

[104] It is reiterated that, the plaintiff's said letter dated 12 February 1999 to D1, the contents of which had been confirmed and accepted by D4, states, inter alia, that the 'existing fixed deposit' inclusive of interest as at December 1998 is a sum of RM2,490,000.

[105] Therefore I agree with the contention by learned counsel for the plaintiff that D4, in accepting and confirming the contents of the said letter dated 12 February 1999, had acknowledged that the fixed deposits pledged with the plaintiff inclusive of interest as at December 1998 is a sum of RM2,490,000. Accordingly, learned counsel for D4 is estopped from contending in his written submissions that the total fixed deposits pledged is RM2,650,000 or RM3,288,052.71, more so, when such sums had not been pleaded in the D4's defence.

[106] In addition, and as stated earlier, learned counsel for D4 had not challenged the 'listing of payments made' showing how the proceeds from the upliftment of the fixed deposits in the said sum of RM2,490,000 had been applied in order to settle or partly pay the debt due and owing to the plaintiff and that hence, the sums and calculations pertaining to the fixed deposits as set out in the 'listing of payments made' are deemed to have been admitted or wholly accepted.

Fixed deposit of RM500,000

[107] The sum of RM500,000 as stated in the letter of offer dated 8 May 1996 (bundle B, pp 29–33) referred to by learned counsel for D4 in his written submissions is a fixed deposit meant to be pledged in respect of the ad hoc facility, and not the said LC/TR/BA facility.

[108] It is undisputed that the plaintiff's claim is not for the ad hoc facility, but for the said LC/TR/BA facility only, as confirmed in the prayers of the statement of claim.

[109] SP1 had, during cross-examination by learned counsel for D4, stated that:

(a) a total sum of RM2,150,000 had been pledged with the plaintiff as fixed

deposits in respect of the said LC/TR/BA facility, and that the sum of RM500,000 as stated in the said letter of offer 8 May 1996 is in respect of the ad hoc facility; and

(b) that the ad hoc facility was a short term facility which had expired or settled on 8 September 1996 ie more than 14 years ago and hence, not a subject matter of the claim.

[110] In the circumstances, it is clear that the the ad hoc facility including the said fixed deposit of RM500,000 pledged in respect thereof, which had been raised as in issue by learned counsel for D4, is irrelevant because it is not the subject matter of the plaintiff's claim herein for the outstanding amounts due under the said LC/TR/BA facility.

[111] It is significant to point out that the contention by learned counsel for D4 that the plaintiff had failed to secure the fixed deposit of RM500,000 is fundamentally at odds with the position taken in D4's defence and his witness statement ie that the bank had failed to take into consideration the said sum of RM500,000 in the calculation of the fixed deposits pledged with the plaintiff.

Interest

[112] I agree with the contention by learned counsel for the plaintiff that the plaintiff were justified and correct in imposing interest at the rate of BLR + 2.5% + 1% as stated in the certificate of indebtedness dated 11 January 2011, having regard to the following:

(a) SP1 had, under cross-examination by learned counsel for D4, disagreed that the interest of BLR + 2.5% + 1%pa as stated in the certificate of indebtedness dated 11 January 2011 was higher than the interest as stated in the letters of offer dated 16 November 1995 and 12 August 1996 (in respect of the said LC/TR/BA facility); and

(b) that SP1 had, during re-examination, by learned counsel for the plaintiff, clarified as follows:

> The interest that the D4's Counsel was referring to was *the normal rate if there was no default by the borrower* … At page 4 of Bundle B (letter of offer dated 16.11.1995) under the 4th paragraph 'overdue interest', which provides: '… *BLR + 4% + 1% penalty on overdue BAs or such other rates as may be determined by Lender from due date until date of payment*'. This is the rate as per the letter of offer. Overdue rate is actually BLR+ 4% +1%. But sometime later, there was a Bank Negara direction to *reduce the interest rate from 4% to 2.5%*. This was in line with the direction by Bank Negara during the financial crisis period in order to help the borrowers. So in fact, the interest that was claimed in the Certificate of Indebtedness from 1.10.1998 onwards is *actually lower than the interest as stated in the letter of offer dated 16.11.1995. So there was no*

prejudice to the borrower. In fact it was better for the borrower. So there is no mistake in the Certificate of Indebtedness.

[113] In the circumstances, although the interest as stated in the certificate of indebtedness dated 11 January 2011 was BLR + 2.5% + 1%, and not BLR + 4% + 1% as stated in that part of the said letter of offer dated 16 November 1995 under 'overdue interest', SP1 had already explained that the 4% had been reduced to 2.5% in line with the direction by Bank Negara, and that the interest claimed by the plaintiff (as stated in the certificate of indebtedness dated 11 January 2011) was actually lower than the rate as stated in the said letter of offer dated 16 November 1995 and hence, causes no prejudice to D4.

[114] Incidentally, D4 had under cross-examination by learned counsel for the plaintiff conceded that he was not complaining about the interest rate imposed by the plaintiff in the said certificate of indebtedness dated 11 January 2011, which is lower than the rate as stated in the said letter of offer dated 16 November 1995.

[115] At any rate, even if, at all, the interest claimed by the bank as stated in the certificate of indebtedness dated 11 January 2011 was not 'in accordance to the rate specified in the overdue interest column (in the said letter of offer dated 16 November 1995)', as alleged by learned counsel for D4, the plaintiff were nonetheless justified and correct to charge interest at the reduced rate of BLR + 2.5% + 1%, having regard to the following:

(a) it is provided for in the said letter of offer dated 16 November 1995 that the plaintiff does 'reserve the right to vary interest in accordance with prevailing market conditions at its own discretion'; and

(b) that cl 12(a) of the said guarantee states as follows:

> 12. We hereby expressly give our consent to your doing at all times without discharging or releasing us or in any way affecting this guarantee the following:
>
> (a) determine or vary any credit to the Customer and/or open and/or continue with any other account or accounts current or otherwise of the Customer with you at any branch or branches;

[116] Mahadev Shankar J (as he then was) in *Chung Khiaw Bank Ltd v Soi Huan & Ors* [1986] 1 MLJ 188 had made the following observation:

> The next line of defence is that the bank unilaterally varied the terms upon which the company was to repay its borrowings and that this variation automatically discharged the sureties. Reference is made to vol 18 of *Halsbury's Law of England* (3rd Ed), pp 502–507. But cll 8–10 of the guarantee in so many words permitted

the bank to resort to other means of payment at any time and in any order that the bank thought fit or to vary or modify the securities held by the bank, and to give time to the company and to vary credit given to the company, without in any way prejudicing the rights of the bank against the guarantors.

[117] For these reasons, the contention by learned counsel for D4 that the interest applied and claimed by the plaintiff in the certificate of indebtedness dated 11 January 2011 is wrong and that the 'certificate of indebtedness has manifest error on the surface of said document and is not a conclusive evidence' is therefore misconceived and devoid of merit.

Discharge of D6

[118] It is not correct for learned counsel for D4 to contend that the plaintiff had withdrawn the claim against D6 '11 hours before the trial commenced'. According to SP1, the plaintiff had resolved the matter amicably with D6 prior to the commencement of trial, resulting in the withdrawal of the plaintiff's claim against D6, and the withdrawal of D6'a counterclaim for, inter alia, damages against the plaintiff.

[119] I do not agree with the contention by learned counsel for D4 that the discharge of D6 as guarantor under the said guarantee automatically discharges the other guarantors, including D4, under the said guarantee, having regard to cl 11(d) of the said guarantee and s 91 of the Contracts Act 1950, and for the reasons which I have given earlier in my findings against D2's case.

[120] Apart from the fact that the plaintiff were entitled to discharge D6 as guarantor under the said guarantee without notifying and/or obtaining the prior consent of the other guarantors, including D4, I find that D4 would have known or ought to have known about the discharge of D6, having regard to the following:

(a) that D4 had, during cross-examination by learned counsel for D5, conceded that D6 had been discharged by the bank 'at the request of the first defendant';

(b) that D4 had, during cross-examination by learned counsel for the plaintiff, conceded that he was aware that the said request for discharge of D6 had been made; and

(c) that that the said letter dated 21 April 1997 from D1 to the plaintiff, which had been copied to the fourth defendant as director of the first defendant, states as follows (bundle J, p 8):

A

> Please be informed that our Finance & Admin Director, Mr Tan Kean Teik, has resigned w.e.f. 21 April 1997. *Therefore, we would appreciate if you could kindly arrange to release him as a guarantor* for the existing banking facilities that he has signed on behalf of Handee Engineering & Consultancy Services Sdn Bhd with yourselves. (Emphasis added.)

B

CONCLUSION

[121] In the circumstances, I find that learned counsel for D4 had not raised any valid grounds to challenge the plaintiff's claim, nor has he shown any manifest error in the said certificate of indebtedness dated 11 January 2011, including the statement of accounts prepared by the plaintiff.

C

[122] Accordingly, judgment is entered against D4 for the sum of RM3,793,835.09 as set out in the said certificate of indebtedness dated 11 January 2011 together with interest at the rate of 8%pa on the said sum of RM3,793,835.09 from the date of judgment to the date of full realisation.

D

D5'S CASE

E

[123] D5 does not deny executing the said guarantee, which is the subject matter of the claim against D5.

F

[124] D5 also does not dispute the certificate of indebtedness dated 11 January 2011, which reflects the amount outstanding pursuant to the facilities that were taken by D1 from the plaintiff.

G

[125] D5's brother in law, Mr Lian Teng Hai ('DW4') testified that D5 had been discharged as guarantor under the said guarantee on the basis, inter alia, that D2 had informed him that the plaintiff had 'agreed to release D5 as guarantor and that the paperwork would be in place soon'. According to D5, DW4 had told her that 'the directors of D1 had informed him that the consent of the plaintiff to release (her) as guarantor had been secured'.

H

[126] Learned counsel for D5 contends that D5 wrote and delivered to the plaintiff, a letter dated 5 January 1999 informing them, inter alia, that she had been informed by D1 that the plaintiff had consented to her release as guarantor and her new address in Kuala Lumpur.

I

[127] This letter was delivered by post and hand by DW4 to the plaintiff. During cross-examination, SP1 did not deny the fact that the plaintiff had been in receipt of D5's letter said dated 5 January 1999.

[128] Learned counsel for D5 contends that on 12 February 1999, the plaintiff wrote a letter to D1 proposing a restructuring of the credit facilities, whereby D5 was no longer required to be a guarantor to the facilities.

[129] It was contended that if the plaintiff took the position that the contents of the said letter dated 12 February 1999 was null and void, the plaintiff should have responded to D5's letter dated 5 January 1999 to inform her that they did not consent to D5 being released as guarantor.

[130] It was further contended that the plaintiff, despite having been informed of the D5's new address on 5 January 1999, did not communicate with D5 until the existence of these proceedings was brought to D5's attention through DW4.

[131] Learned counsel for D5 submitted that by reason of the plaintiff's said conduct, the doctrine of estoppel by conduct must operate against the plaintiff in respect of its insistence that D5 continue to be obligated to the plaintiff pursuant to the terms of the said guarantee. In support of his contention, he cited the case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283, and *Alfred Templeton & Ors v Mount Pleasure Corp Sdn Bhd* [1989] 1 CLJ Rep 219.

[132] It was contended that the plaintiff had led D5 to believe that she had been released as a guarantor and that by failing to rebut the contents of D5's said letter dated 5 January 1999, the plaintiff had encouraged D5 into believing that she had been released. It was therefore submitted that it would be unjust to permit the plaintiff to insist upon their strict legal rights in that the D5 defendant continues to be liable under the terms of the said guarantee.

[133] Learned counsel submitted that the said guarantee is an on demand guarantee. He cited the case of *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610 in support of his contention that a demand was required in order to create a cause of action against D5.

[134] Learned counsel also cited the case of *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad* [1989] 3 MLJ 155 in support of his contention that, despite there being a principal debtor clause in the said guarantee, a demand was still required to be served upon D5 in order to establish a claim against her. He also cited the High Court decision in *MBf Finance Bhd v Hasmat Properties Sdn Bhd & Ors* [1990] 1 MLJ 180 on this issue.

[135] Coming back to the facts of this case, the address of D5 in the execution page of the said guarantee is stated to be No 12, Jalan Sentosa, Tanjung Bungah Penang.

[136] D5 said in evidence that her correspondence address had been changed from the said Tanjung Bungah address to No 28, Jalan SS 22A/3, Damansara Jaya, 47400 Petaling Jaya and that notice of this change of address was given to the plaintiff vide her said letter dated 5 January 1999.

[137] It is not in dispute that the plaintiff had issued or sent the said notices of demand to D5 at the address as stated in the said guarantee ie No 12, Jalan Sentosa, Tanjung Bungah Penang.

[138] Learned counsel for D5 argued that it would 'defy logic' for the plaintiff to issue the said notices of demand to the Tanjung Bungah address when the plaintiff had been informed of D5's new address at No 28, Jalan SS 22A/3, Damansara Jaya, 47400 Petaling Jaya.

[139] Learned counsel for D5 therefore submitted that the plaintiff had sent the said notices of demand to the wrong address of D5 and that hence, must be deemed to have not sent a proper demand on the guarantor.

FINDINGS

Discharge of D5

[140] Contrary to the contention by learned counsel for D5, the plaintiff had not discharged D5 as guarantor under the said guarantee, for the following reasons:

(a) that according to SP1, the plaintiff had not discharged D5 as guarantor under the said guarantee and that the usual practice adopted by the plaintiff in discharging a guarantor would be a letter to that effect by the plaintiff to the guarantor eg the letter of discharge dated 11 June 1997 issued by the bank to D6, Mr Tan Kean Teik;

(b) that there was no letter by the plaintiff to D5 discharging her as guarantor under the said guarantee, nor was there any letter by D5 (or D1 and/or their directors) to the plaintiff requesting for a discharge of D5 as guarantor under the said guarantee; and

(c) that the said letter dated 12 February 1999 to D1 did not state that D5 had been discharged as guarantor under the said guarantee and that in any event, this letter had been declared null and void by virtue of the plaintiff's said letter dated 10 April 2000 to D1.

[141] In the circumstances, I agree with the submission by learned counsel for the plaintiff that the evidence by DW4 that the plaintiff had discharged D5 as guarantor under the said guarantee is self-serving and unsubstantiated, more

so, in the light of DW4's acknowledgments made during cross-examination by learned counsel for the plaintiff:

(a) that he had no personal knowledge that the plaintiff had discharged D5 as guarantor under the said guarantee;

(b) that there was no letter by the plaintiff to D5 stating that D5 had been discharged as guarantor under the said guarantee;

(c) that there was 'no wording to that effect' in the said letter dated 12 February 1999 that the plaintiff had agreed to discharge D5 as guarantor under the said guarantee;

(d) that based on the said letter dated 10 April 2000, the said letter of 12 February 1999 had been declared null and void, and had no effect; and

(e) that he had formed the view or assumed that D5 had been discharged as guarantor under the said guarantee on the basis of what D2 had allegedly told him and his own interpretation of the contents of the said letter dated 12 February 1999, which letter had subsequently been declared null and void.

[142] It is significant to note that DW4's evidence that the D2 had told him that the plaintiff had 'agreed to release the D5 as guarantor and the paper work in respect of the same would be put in place soon' is hearsay evidence and inadmissible, as the D2 had given no such evidence to this effect.

[143] It is apt to point out that though D2 during cross-examination by learned counsel for D5 had stated that he 'talked to D3 and D4 to talk to the banker' pertaining to the request for the discharge of D5 as guarantor under the said guarantee:

(a) D3 during cross-examination by counsel for the D5 had stated as follows:

  (i) that he was not aware that D5 was 'trying to release herself from the said guarantee, nor was he aware that there were attempts to discharge her as guarantor under the said guarantee; and

  (ii) that to his knowledge, D5 had not been discharged as guarantor under the said guarantee and that it was only D6 who had been discharged as guarantor under the said guarantee;

(b) that D4 during cross-examination by learned counsel for the plaintiff had stated that he was aware that there were efforts made by D5 (not D1 and/or their directors) to apply for her discharge as guarantor under the said guarantee, but that he was not aware of any letter from the plaintiff discharging D5 as guarantor under the said guarantee.

[144] In the circumstances, I agree with the contention by learned counsel for the plaintiff that the evidence by D5 that DW4 had told her that 'the directors of D1 had informed him that the consent of the plaintiff to release (her) as guarantor had been secured' is not only hearsay evidence and hence, inadmissible, but is uncorroborated by the evidence by D2, D3 and D4 who, at the material time, were directors of D1.

[145] Needless to say, D5's evidence in relation to her alleged discharge as guarantor under the said guarantee must be disregarded, more so, having regard to her acknowledgments made during cross-examination by learned counsel for the plaintiff, as follows:

(a) that she had no personal knowledge that the plaintiff had consented to release her as guarantor and that this had merely been conveyed to her by DW4;

(b) that she is not sure whether the plaintiff's consent to release her as guarantor had been secured; and

(c) that she had not received any letter from the plaintiff informing her that she had been discharged as guarantor under the said guarantee.

[146] The plaintiff had not led D5 to believe that she had been released as a guarantor nor did they encourage D5 into believing as such, for the following reasons:

(a) that the plaintiff had not issued any letter to D5 informing her that she had been discharged as guarantor under the said guarantee;

(b) that the plaintiff had not confirmed nor accepted the contents of the said letter dated 5 January 1999 by D5 (unlike the said letters dated 12 February 1999 and 10 April 2000 by the plaintiff to D1, which contents had been confirmed and accepted by D1's then directors);

(c) that the plaintiff were not obliged to respond to the said letter dated 5 January 1999 and that in any event, the fact that they have not responded to that letter does not automatically mean that D5 had been discharged as guarantor under the said guarantee; and

(d) that in the circumstances, and in the absence of a letter from the plaintiff to D5 discharging her as guarantor under the said guarantee, the said letter dated 5 January 1999 stands at best a unilateral attempt on the part of D5 to discharge herself as guarantor under the said guarantee.

[147] Therefore, contrary to the contention by learned counsel for D5, it would not be unjust for the plaintiff to 'insist on their strict legal rights in that

D5 continues to be liable under the terms of the said guarantee, more so, considering the following:

(a) that the said guarantee is an agreement which had been entered into by D5 and that she is accordingly bound by the terms and conditions therein;

(b) that there is no term in the said guarantee allowing D5 to unilaterally or arbitrarily determine the said guarantee by way of the said later dated 5 January 1999, or otherwise. On the contrary, cl 24 of the said guarantee provides as follows:

> You may enforce this guarantee against us at any time notwithstanding that any bills or other instruments covered by it may be in circulation or outstanding and you may include the amount of the same or any of them to the whole amount outstanding or not at your option, and this guarantee *shall not be determinable by us except on the terms of our making full provision up to the limits of our guarantee for any then outstanding liabilities or obligations owing by the Customer to you.* (Emphasis added.)

(c) that under the said cl 24, it is clear that D5 is not entitled, whether by way of the said letter dated 5 January 1999, or otherwise, to unilaterally or arbitrarily determine the said guarantee until and unless the outstanding sums due and owing by D1 to the bank have been fully settled.

NOTICE OF DEMAND

Address

[148] It is not disputed that the said notices of demand had been issued or sent to D5 at the address as stated in the said guarantee ie No 12, Jalan Sentosa, Tanjung Bungah, Penang.

[149] Learned counsel for D5 argues that:

(a) the plaintiff were not entitled to issue or send the said notices of demand to the address as stated in the said guarantee, but should have issued or sent the same to the address as stated in the said letter dated 5 January 1999 ie No 28, Jalan SS 22A/3, Damansara Jaya, 47400 Petaling Jaya; and

(b) the D5 had not received the said notices of demand.

[150] I agree with learned counsel for the plaintiff that the plaintiff were justified and entitled to issue or send the said notices of demand to the address as stated in the guarantee notwithstanding the said letter of 5 January 1999

stating the purported 'new address' of the D5 given that under cl 21 of the said guarantee, the plaintiff are entitled to issue the said notices of demand either to the last known address of D5 or the address as stated in the said guarantee.

Clause 21 provides that:

> Any demand for payment of moneys or any other demand or notice under this guarantee may be made by a Manager, Accountant or an Officer for the time being of yours or by any person or firm for the time being acting as solicitor or solicitors for you by letter addressed to us our executors administrators or legal representatives and sent by post or delivered to *our address last known to you or stated hereunder* and a notice or demand so given or made shall be deemed to be given or made or received at the time when the letter would in the ordinary course of post be delivered. (Emphasis added.)

[151] It is interesting to note that D5 and her witness, SD4 in their respective evidence, had made the following revelations:

(a) that the said letter dated 5 January 1999 by the D5 was in fact not written by D5;

(b) the address of D5 as stated in the said guarantee ie No 12, Jalan Sentosa, Tanjung Bungah, Penang was in fact not the address of D5, but a friend of DW4; and

(c) the 'new address' as stated in the said letter dated 5 January 1999 ie No 28, Jalan SS 22A/3, Damansara Jaya, 47400 Petaling Jaya was in fact not the address of the D5 as well.

[152] In short, none of the addresses as provided by D5, whether in the said guarantee or the said letter dated 5 January 1999, were in fact her addresses. Incidentally, there was no address stated in D5's witness statement tendered at the trial.

[153] Apart from the plaintiff's contractual entitlement to issue or send the said notices of demand to D5 at the address as stated in the said guarantee, I agree with the contention by learned counsel for the plaintiff that, given the circumstances of this case, the plaintiff had rightly issued the said notices of demand to the address as stated in the said guarantee, being an agreement that she had executed, as opposed to the 'new address' as stated in the said letter dated 5 January 1999, which address, as it turns out was not the address of D5.

Presumption of service

[154] In any event, it is immaterial whether or not the said notices of demand had been received by D3 in view of the terms and conditions of the said guarantee and, more importantly, the established principle of law that the bank are not required to show that the notice of demand had been received by a guarantor so as to constitute a proper demand, but are only required to show that the notice of demand had been issued or sent to the guarantor (see my findings in relation to D3's case).

[155] It has to be remembered that learned counsel for D5 is not disputing that the said notices of demand had been issued or sent to D5 at the address as stated in the said guarantee, but are only disputing the fact that D5 had received the said notices of demand.

Principal debtor clause

[156] Besides, I also agree with the contention by learned counsel for the plaintiff that the said notices of demand were not required to be issued or sent to D5, having regard to the 'principal debtor clause' in the said guarantee, which obviates the need for the service of a notice of demand (see my findings in relation to D3's case).

[157] Apart from the case of *Mok Hin Wah v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610, which is distinguishable on its facts and hence not applicable herein (see my findings in relation to D3's case), learned counsel for D5 also cited the case of *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad* [1989] 3 MLJ 155 in support of his contention that, despite there being a principal debtor clause in the guarantee, a demand was still required to be served upon a guarantor in order to establish a claim against him. He also cited the High Court decision in *MBf Finance Bhd v Hasmat Properties Sdn Bhd & Ors* [1990] 1 MLJ 180 on this issue.

[158] The *Orang Kaya*'s case is distinguishable on its facts because in that case, only a carbon copy of the notice of demand had been issued to the guarantors, whereas in this case, the actual notices of demand had been issued or sent to D5 at the address as stated in the said guarantee, as conceded by learned counsel for D5.

[159] In addition, in the *Orang Kaya*'s case, the effect of a 'principal debtor clause' had not been fully considered. In this regard, Heliliah bt Mohd Yusof JCA (as she then was) in *Danaharta Urus Sdn Bhd v Chou Kok Hong & Anor* [2006] MLJU 350; [2006] 7 CLJ 330 had observed as follows (at p 343):

> The *Orang Kaya* case is still distinguishable. No detailed consideration was shown on the effect of a principal debtor clause and is therefore not appropriate as an authority that is binding on the present case. In any case I agree that more emphasis was placed on the copy of the demand sent being only a carbon copy and therefore did not constitute a proper demand following the Supreme Court decision in *Mok Hin Wah v UMBC* [1987] 2 MLJ 610.

[160] As pointed out by learned counsel for the plaintiff, the High Court in the cases of *Public Bank v Chan Siok Lee & Ors* [1989] 2 MLJ 305, *Credit Corporation (M) Berhad v Choi Sang & Anor* [1989] 1 CLJ (Rep) 440, and *United Merchant Finance Bhd v Hockwood Holdings Sdn Bhd & Ors* [1999] 5 MLJ 85 had fully considered the effect of a 'principal debtor clause'.

[161] In this context, it is relevant to re-highlight cl 17 of the said guarantee ie the 'principal debtor clause:

> 17. Though as between us and the Customer we are sureties only for the Customer, yet as between us and you we and each of us shall be deemed to be principal debtors for all the moneys the payment of which is hereby guaranteed and accordingly shall *not be discharged nor shall our liability be affected by any fact or circumstances or any act thing omission or means whatsoever, whereby our liability would not have been discharged if we had been the principal debtors.* (Emphasis added.)

[162] Is also relevant to re-highlight cl 18 of the said guarantee, which provides that:

> 18 For the consideration aforesaid and as a separate and independent stipulation:
>
> (a) we hereby agree that all sums of moneys which *may not be recoverable from us on the footing of a guarantee* whether by reason of any legal limitation disability or incapacity on or of the Customer or any other fact or circumstances, whether known to you or not *shall nevertheless be recoverable from us on demand as though we were the sole and principal debtors.* (Emphasis added.)

[163] It is important to note that the Supreme Court in the *Orang Kaya*'s case had not considered as well the effect of a clause such as cl 18 of the said guarantee.

[164] In the circumstances, I find that the *Orang Kaya*'s case is not applicable to the case herein, and is therefore not binding on this court. A

[165] I am inclined to agree with the contention by learned counsel for the plaintiff that if the court should accept the contention by learned counsel for D5 that 'a proper demand must be made and it is a condition precedent to establishing a claim against a guarantor', this would be tantamount to defeating or overriding the purpose and intention of not only cl 17 of the said guarantee, which makes the D5 a principal debtor, but cl 18 of the said guarantee as well, which provides that all monies which may not be recoverable from the guarantors on the 'footing of a guarantee', shall nevertheless be recoverable from the guarantors on demand as though they were the principal debtors. B C

[166] The case of *MBf Finance Bhd v Hasmat Properties Sdn Bhd & Ors* [1990] 1 MLJ 180, being a High Court decision, is not a decision which is binding on this court, and that the decisions by Mahadev Shankar J (as he then was) in the *Public Bank* case, Siti Norma Yaakob J (as she then was) in the *Credit Corporation* case and Clement Skinner J (as he then was) in *United Merchant Finance* case, all of which had held that the presence of a 'principal debtor clause' obviates the necessity to issue a notice of demand upon the guarantors as the 'issuance of the writ is a demand in itself, ought to be preferred and applied by this court instead. D E

[167] In the circumstances, and quite apart from my finding that the said notices of demand had been properly served upon D5 for the reasons set out above, I find that, having regard to the terms and conditions of the said guarantee and the case authorities, there was in any event no requirement to issue a notice of demand upon D5 as a pre-condition to commencing the claim herein against her to recover the outstanding sums due under the said LC/TR/BA facility. F G

CONCLUSION

[168] For these reasons, I find that learned counsel for D5 has not raised any valid grounds to challenge the plaintiff's claim. Accordingly, and as learned counsel for D5 had not challenged the certificate of indebtedness dated 11 January 2011, judgment is entered against D5 for the sum of RM3,793,835.09 as set out in the said certificate of indebtedness dated 11 January 2011 together with interest at the rate of 8%pa on the said sum of H I

RM3,793,835.09 from the date of judgment to the date of full realisation.

Costs

[169] Each the defendants to pay costs of RM20,000 to the plaintiff.

Claim allowed.

Reported by Afiq Mohamad Noor